

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 CASE NO. 08-13555-scc ADV. CASE NO. 08-01420

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5 In the Matter of:

6

7 LEHMAN BROTHERS HOLDINGS INC.,

8

9 Debtor.

10 - - - - - x

11 In the Matter of:

12

13 LEHMAN BROTHERS INC.

14

15 - - - - - x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 November 4, 2015

21 10:07 AM

22 B E F O R E:

23 HON. SHELLEY C. CHAPMAN

24 U.S. BANKRUPTCY JUDGE

25 ECRO - TB

1 HEARING Re: Doc #50899 Five Hundred Eighth Omnibus  
2 Objection to Claims (Disputed Valuation Claims) reset for  
3 12/17/15 at 10 a.m.  
4

5 HEARING Re: Adversary proceeding: 08-01420-scc Lehman  
6 Brothers Inc.; Doc #12655 Trustees Motion to Reclassify  
7 Certain Deferred Compensation Claims as Unsecured Non-  
8 Priority General Credit Claims  
9

10 HEARING Re: Adversary proceeding: 08-01420-scc Lehman  
11 Brothers Inc., Doc #12656 Trustee's Motion to Reclassify  
12 Certain Substantively identical Deferred Compensation Claims  
13 as Unsecured General Creditor Claims  
14

15 HEARING Re: Adversary proceeding: 15-01299-scc Lehman  
16 Brothers Holdings Inc., in its capacity as v Longwood at  
17 Oakmont, Inc., Pre-trial conference  
18

19 HEARING Re: Adversary proceeding: 15-01300-scc Lehman  
20 Brothers Holdings Inc., in its capacity as v Presbyterian  
21 SeniorCare, Pre-trial conference  
22

23

24

25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Please have a seat. How are you  
3 today, Mr. Fail?

4 MR. FAIL: Good morning, Your Honor. Very well,  
5 thank you. And yourself?

6 THE COURT: Good.

7 MR. FAIL: For the record, Garrett Fail, Weil  
8 Gotshal & Manges for Lehman Brothers Holdings, Inc.

9 Your Honor, you may recall that on June 30th, the  
10 Court entered an order after notice to all parties in  
11 interest, extending for 18 months the deadline for the plan  
12 administrator to object to all claims against the debtors.

13 Shortly thereafter the debtors objected in their  
14 508th omnibus objection to Claim No. 67938, which is  
15 significant in size, even in the context of these cases,  
16 Your Honor. That claim was filed BNP Paribas and at this  
17 time, seeks more than \$114 million.

18 This is a derivatives claim where the primary  
19 obligor was a foreign affiliate not under the control of  
20 LBHI or the Chapter 11 debtors post-petition. As set forth  
21 in the objection, as it did with tens of thousands of other  
22 claims, Your Honor, the plan administrator reviewed the  
23 documentation submitted with the claim, reviewed the  
24 debtor's records and other available determination, to  
25 determine the fair, accurate, reasonable value of the claim

1 based on the underlying documents.

2 BNP filed a response to the objection. It asked  
3 the Court to reject or essentially dismiss the objection and  
4 allow the guarantee claim in full.

5 It notes that BNP filed both derivative and  
6 guaranteed questionnaires required for derivative guarantee  
7 claims. It says that it provided information required by  
8 the ISDA agreements and the questionnaires. It says that it  
9 supported the valuation techniques that it used to calculate  
10 the termination claims, and therefore, it concludes the  
11 objection is insufficient to rebut the presumption of  
12 validity of the claim.

13 But whether BNP submitted all of the information  
14 in its claim, in the guarantee questionnaire, in the  
15 derivatives questionnaire that was required by the Court's  
16 orders and by the underlying ISDA agreements, to be entitled  
17 to an initial presumption ability, and whether the plan  
18 administrator has or can rebut the presumption, that's not  
19 before the Court today at this initial sufficiency hearing.

20 That argument and evidence regarding valuation  
21 would be heard at a merits hearing at some later date. So,  
22 Your Honor, why are we here today.

23 We're here today because BNP believes that there  
24 should not be a merits hearing on this claim. And BNP  
25 alleges that LBHI cannot object to a guarantee claim,

1 specifically where the primary claim has been allowed by  
2 LBF, the non-controlled affiliate's foreign administrator.

3 As set forth in LBHI's reply, that argument is  
4 inconsistent with the debtor's plan, with U.S. law and  
5 indeed with Swiss law.

6 Section 9.1 of the debtor's plan which was  
7 confirmed explicitly reserved the debtor's right to "object  
8 to, oppose and defend against all claims on any basis." It  
9 went on to specifically say, "notwithstanding that a primary  
10 claim is allowed against a primary obligor, the debtor's  
11 reserve the right to object to, oppose, and defend against  
12 all guarantee claims."

13 This provision existed because the debtors knew  
14 that various foreign administrators and estates would have  
15 different levels of capabilities, resources, interests, and  
16 in interests in objecting to various primary claims. In  
17 this instance, with respect to BNP's primary claim, it  
18 appears LBF didn't challenge any one of the 1,300  
19 termination values for example.

20 Your Honor, as cited in the cases in LBHI's reply,  
21 we believe U.S. law simply does not prohibit challenges to  
22 the amounts of an underlying guarantee claim, even if  
23 there's an unconditional guarantee, and here we're not  
24 challenging the nature of the guarantee.

25 And, Your Honor, as stated in our reply under

1 Swiss law, a claim allowed pursuant to a co-location  
2 proceeding, which BNP's claim was, is done without a  
3 judicial proceeding, without court order, without any  
4 showing, without any admission, the allowance isn't binding  
5 on any other party and it's not binding in LBF in any other  
6 proceeding.

7 So, Your Honor, if the Court agrees that LBHI has  
8 the obligation and indeed the right to review and object  
9 where appropriate to claims filed against it, LBHI would  
10 proceed in due course over time to prosecute the objection  
11 if a consensual resolution cannot be received either  
12 voluntarily or through ADR.

13 And, Your Honor, if you have any questions I'm  
14 happy to answer them at this time.

15 THE COURT: So the request is I think summarized  
16 at the end of the reply, which is simply that -- to make  
17 clear that the trust -- that the debtors can continue as you  
18 said to prosecute the objection.

19 MR. FAIL: That's right, Your Honor.

20 THE COURT: All right. Why don't I hear from  
21 counsel for BNP.

22 MR. FAIL: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. BELTZER: Good morning, Your Honor, Howard  
25 Beltzer and Christine Walsh from Mayer Brown for BNP



1 Paribas.

2 If I might, Your Honor, I'll be brief, but I'd  
3 like to begin with the recitation of the background of this  
4 hearing, and what I hope is a reasonable way forward.

5 THE COURT: Okay.

6 MR. BELTZER: And one which would not require a  
7 decision by Your Honor on the issue presented in Mr. Fail's  
8 reply from last Friday, but let me get into the background  
9 for a moment.

10 BNP filed --

11 THE COURT: Wait. When you say would not require  
12 a decision on the issue presented, what do you mean by that?

13 MR. BELTZER: I'm suggesting, Your Honor, that the  
14 suretyship law on the precise effect of the Swiss allowance  
15 of the underlying claim on the guarantor's right to object  
16 to the guarantee claim.

17 THE COURT: That's not -- I mean, that -- I don't  
18 view that issue as being before me today.

19 MR. BELTZER: Okay.

20 THE COURT: I view the issue before me today is go  
21 or no go. In other words, your position is that there can  
22 be no challenge to the claim. And so either we're going to  
23 stop and never come back again after today or we're going to  
24 keep going, so.

25 MR. BELTZER: I'm actually suggesting, Your Honor,

1 that we keep going, but that we reserve on the issue  
2 ultimately of whether Your Honor would be bound to give  
3 deference to the Swiss court determination.

4 THE COURT: Again, I'm going to repeat, I don't  
5 disagree with you, right? But what you -- your choice  
6 number one would be for me to say, objection overruled,  
7 done. Claim fully allowed in the full amount.

8 MR. BELTZER: Your Honor, as Mr. Fail noted in his  
9 reply, the parties have exchanged documents.

10 THE COURT: Right.

11 MR. BELTZER: I will report to Your Honor that in  
12 the past BNP had asserted claims in these proceedings in  
13 excess of a billion dollars I believe at the beginning.  
14 They've all been sequentially allowed, stipulated, the  
15 parties have engaged in extremely --

16 THE COURT: Right.

17 MR. BELTZER: -- dialogue over time.

18 THE COURT: Right.

19 MR. BELTZER: I would hope that that would be the  
20 case here. And it's really just a question -- I viewed it  
21 as Mr. Fail -- the estate trying as a threshold matter to  
22 say, you are not bound, and think we should just reserve on  
23 that issue.

24 THE COURT: I'm not going to make any such  
25 pronouncements. Obviously, there are -- it's obvious to me

1 that there are a lot of complicated issues that --

2 MR. BELTZER: Yes.

3 THE COURT: -- have to do with the interplay  
4 through various laws --

5 MR. BELTZER: Yes.

6 THE COURT: -- the plan, it's a very multi-layered  
7 analysis.

8 MR. BELTZER: Yes.

9 THE COURT: So I view this simply as binary. Do  
10 we never see you again --

11 MR. BELTZER: Right.

12 THE COURT: -- or do we keep going and allow the  
13 estate to continue to prosecute its objection. So if you're  
14 agreeing, I mean, I'm going to allow the estate to continue  
15 to prosecute its objection.

16 MR. BELTZER: Right.

17 THE COURT: I'm not going to make any  
18 pronouncement on anything remotely related to the merits.

19 MR. BELTZER: So that was going to be my  
20 suggestion after seven eloquent minutes I think we're fine  
21 with that, thank you, Your Honor.

22 THE COURT: All right. So I don't even know, Mr.  
23 Fail, if I need -- what kind of an order I need today.

24 MR. FAIL: Thank you, Your Honor. I don't think  
25 any order is requested or required. I think there's been an

1 objection pending, we'll treat guaranteed claims -- the  
2 estate will treat guarantee claims where the primary obligor  
3 is LBF, as it would treat every other guarantee claim, the  
4 thousands of others, and proceed with this objection either  
5 voluntarily, settlement, the ADR, litigation, we'll set up a  
6 schedule --

7 THE COURT: And BNP's rights are reserved --

8 MR. FAIL: -- I'm sure we'll be able to work  
9 through that.

10 THE COURT: -- to make the arguments that you  
11 can't do any of that.

12 MR. FAIL: Right, Your Honor. And if it becomes a  
13 threshold issue that can't be -- you know, that gets in the  
14 way of something we may be back here for that issue. And if  
15 it makes sense to just go forward with a full trial, we'll  
16 be back at that point.

17 THE COURT: Okay. All right. That sounds good.  
18 Thank you very much.

19 MR. BELTZER: Thank you, Your Honor.

20 MR. FAIL: Thank you very much, Your Honor.

21 Your Honor, the next item on the agenda is the LBI  
22 docket.

23 THE COURT: I think that's right.

24 MR. FAIL: And with the Court's permission, may I  
25 be excused?

1 THE COURT: Yes.

2 MR. FAIL: Thank you.

3 THE COURT: Thank you. Good morning.

4 PARTIES: Good morning, Your Honor.

5 MR. FITZPATRICK: Good morning, Your Honor, Jim  
6 Fitzpatrick and Karen Chau for the LBI trustee.

7 THE COURT: Okay.

8 MR. FITZPATRICK: With Your Honor's permission I  
9 believe there are -- each motion is listed separately on the  
10 agenda --

11 THE COURT: Right.

12 MR. FITZPATRICK: -- but I'll address both of them  
13 at the same time --

14 THE COURT: Sure.

15 MR. FITZPATRICK: -- because substantively they're  
16 essentially the same, Your Honor.

17 Really what I would -- the only thing I would like  
18 to add in connection with our papers, is that the  
19 opposition, as Your Honor knows --

20 THE COURT: Before you get started --

21 MR. FITZPATRICK: Yes.

22 THE COURT: -- could I clarify the overlap between  
23 this and what's come before this?

24 MR. FITZPATRICK: Yes.

25 THE COURT: So that I understand what we've done

1 with respect to these claims? Are these the same claims  
2 that have been subordinated?

3 MR. FITZPATRICK: That we are seeking to  
4 subordinate, yes, Your Honor.

5 THE COURT: That you're seeking to subordinate.

6 MR. FITZPATRICK: Yes, Your Honor.

7 THE COURT: So there was a trial.

8 MR. FITZPATRICK: No, I'll clarify for Your Honor.

9 THE COURT: Okay.

10 MR. FITZPATRICK: Yes. We -- the trustee  
11 originally by objection and subsequently converted by Your  
12 Honor's order to an adversary proceeding --

13 THE COURT: Right.

14 MR. FITZPATRICK: -- brought an action to  
15 subordinate these claims.

16 The claimants moved to compel arbitration.

17 THE COURT: Right.

18 MR. FITZPATRICK: Which we opposed. Your Honor  
19 denied --

20 THE COURT: Denied it.

21 MR. FITZPATRICK: -- the motion to compel  
22 arbitration. That was appealed to the district court. The  
23 Court --

24 THE COURT: And affirmed, and I was affirmed.

25 MR. FITZPATRICK: -- Judge Ramos affirmed.

1 THE COURT: Right.

2 MR. FITZPATRICK: That has now been appealed just  
3 within the last several days to the Second Circuit, so  
4 there's a Second Circuit appeal --

5 THE COURT: Okay.

6 MR. FITZPATRICK: -- pending on the issue of  
7 whether to compel arbitration.

8 In addition to the appeal of the arbitration  
9 motion --

10 THE COURT: There's a motion to withdraw the  
11 reference.

12 MR. FITZPATRICK: -- a move to withdraw the  
13 reference, that has not been -- that's pending before Judge  
14 Ramos.

15 THE COURT: Okay.

16 MR. FITZPATRICK: That hasn't been ruled on.

17 THE COURT: Okay.

18 MR. FITZPATRICK: But that is all with respect to  
19 the adversary proceeding to subordinate the claims.

20 This motion is for the same claims, but to address  
21 the separate issue of whether they are secured or not. And  
22 it is the trustee's position that without prejudice to any  
23 arguments being made as to whether or not they are  
24 subordinated, they are clearly not secured.

25 And the reason we make that motion now, frankly,

1 as Your Honor is well aware, the estate reserves at  
2 different tiers and is currently reserving the 260 million  
3 approximate dollars for these claims within the secured  
4 pool.

5 And so what this request, if granted, would allow  
6 us to do is to move it into the general unsecured creditor  
7 pool, and then it would be available for general creditors  
8 and pending -- without prejudice and pending anything that  
9 happens with respect to the issue of whether the claims are  
10 subordinated or not.

11 THE COURT: Okay.

12 MR. FITZPATRICK: In terms of the merits, the  
13 objection to our motion or the opposition to our motion was  
14 largely focused on the procedure and the burdens that each  
15 party had. And so we just wanted to clarify.

16 The trustee's position is that in order to bring a  
17 secured claim that's based on a document, as part of the  
18 proof of claim, one has to write the documents and also  
19 evidence that this security interest has been perfected  
20 under Bankruptcy Rule 3001.

21 There was no submission, of course, that any  
22 security interest was perfected, and as -- in terms of  
23 submission of the document, there was a document submitted,  
24 which was the ESOP agreement. But that agreement doesn't  
25 give any indication that the claims are secured, in fact, it



1 says the opposite, it's unsecured. And so first, the  
2 trustee's position would be that that doesn't even reach the  
3 level of meeting the prima facie burden, so that we have to  
4 come forward with any evidence.

5 Alternatively, if it's considered that just saying  
6 in the proof of claim that it is secured is sufficient, we'd  
7 submit the agreement itself which says that they are  
8 unsecured is more than enough to meet the trustee's burden  
9 to come forward with some evidence, and then the burden  
10 would shift back to the claimants.

11 And again, we are unaware of any evidence that --  
12 what the agreement says isn't what it means, which is that  
13 it's unsecured. We're not aware of any evidence or any law  
14 that would suggest that despite this agreement that says  
15 this, in fact, the claimants have secured claims. And so  
16 that's the basis -- the substantive basis of our position.

17 We also addressed and I think that's been conceded  
18 that this was likely an error by pro se claimants. There  
19 was a box checked on some for wages earned, but they clearly  
20 were not earned within 180 days of the bankruptcy. So we  
21 addressed that. I don't think that's really in dispute, so  
22 they're not priority either.

23 And so unless Your Honor has questions, that's our  
24 position.

25 THE COURT: Okay. All right. Thank you. Good

1 morning.

2 MR. SCAROLA: Rick Scarola for the claimants, some  
3 of the claimants, 344 of the claims that are in issue.

4 Your Honor has probably read sufficiently our  
5 papers to understand that the issue we have is most  
6 immediately one of procedure. What I heard Mr. Fitzpatrick  
7 say is more than --

8 THE COURT: Well, let me --

9 MR. SCAROLA: I'm sorry.

10 THE COURT: Let me tee it off. Because Mr.  
11 Fitzpatrick has it right, you -- it takes more than simply  
12 stating that you have a secured claim in order to get out of  
13 the starting gate. So at its most fundamental level, a  
14 secured claim requires that the claimant have a lien on  
15 property of the debtor's estate. If you had a mortgage on a  
16 building, if you had something.

17 Your description and you have three different  
18 theories, so to speak, doesn't satisfy that. So it's as if  
19 you are alleging that, for example, your claimants were  
20 secured by the -- a security interest in the old  
21 headquarters building, and you don't attach a mortgage and  
22 then you turn to the trustee and he says, well, there is no  
23 such mortgage. And then under your view, I think, of the  
24 way the burden shifts, you still would prevail because the  
25 trustee can't come up with what you've alleged exists.

1 So you've made a declaration of a secured claim,  
2 but you haven't satisfied the initial burden of any  
3 documentation or any recitation of the elements that, in  
4 fact, constitute a secured claim.

5 So it's not a matter of evidence or not. There's  
6 nothing to shoot at if you will.

7 MR. SCAROLA: Your Honor, if that's going to be  
8 your ruling I understand that. I'll address it briefly, but  
9 it is in our papers.

10 Let me tell you the Section 541 proposition as an  
11 example. It is not possible -- this is not a security  
12 interest in the nature of a mortgage. If it were, there'd  
13 be a mortgage attached.

14 This is a proposition of law. It's stated in the  
15 proof of claim. There's nothing one could attach. However,  
16 what matters here, and I don't think it's fair to  
17 characterize it as Your Honor did or it's accurate to  
18 characterize it as Your Honor did that there's nothing to  
19 shoot at, is that that has been stated plainly. There's no  
20 document one could attach on that issue.

21 Now, before the motion was made, if I may, it will  
22 not take long --

23 THE COURT: No, that's okay.

24 MR. SCAROLA: -- but I do need to say this. Mr.  
25 Fitzpatrick and I have a collegial relationship for a couple

1 of years. He actually asked Judge Ramos in effect for I'll  
2 call it loosely an advisory ruling that it wasn't going to  
3 conflict with his jurisdiction while the arbitration appeal  
4 was pending before him if this motion remained, and we spent  
5 some time in front of Judge Ramos.

6 We talked then, and I said -- and Judge Ramos  
7 said, I've got a thick skin, if you think you're not  
8 invoking contract provisions that are at issue here, more  
9 power to you, go ahead, make your motion. And before he did  
10 that, I said, Jim, these are the issues, what do you have to  
11 say about them. And what I got was ships passing in the  
12 night. I got references to the Section 507 proposition,  
13 which is checked by a few of the claimants. I think these  
14 are individuals claims.

15 It's clearly, the 507 proposition about retirement  
16 funds collected in the last 180 days is obviously a non-fit.  
17 This is a 1986 deferred compensation plan, and that's not  
18 something we're arguing.

19 Yet he argued that to me, and that's the only  
20 substantive point that he argues in his papers. There's no  
21 substantive -- the reference to Section 541 or the other  
22 propositions in the proof of claim apart from simply quoting  
23 it, it is not discussed at all by the trustee.

24 THE COURT: Well, I think the difficulty --

25 MR. SCAROLA: And if Your Honor is going to --

1 THE COURT: I think the difficulty is that it's  
2 very hard to refute something that you believe is inapposite  
3 and baseless. It's very hard to argue in an analytical way  
4 with something that you believe is simply inapplicable or  
5 insufficient.

6 So we can go through each of your three bases, and  
7 I can explain to you why I believe they're insufficient, but  
8 that's the fundamental disconnect. Is that it's essentially  
9 asking somebody to prove a negative. Where the trustee is  
10 at a loss to do -- say anything more than what he said  
11 because frankly there's nothing more to say.

12 There -- if -- the grounds are so wide of the  
13 mark, that there's nothing more than can be meaningful said.  
14 So if you feel that there's something else that you can do  
15 to persuade me that what you allege as the basis of these  
16 being secured claims, I'm very happy to listen to it. But I  
17 don't see it.

18 MR. SCAROLA: Your Honor, I can simply say and I  
19 will rest on the papers in this respect, the trustee, I  
20 believe, and it's what lawyers often do, could have made its  
21 argument as to a view, if it had that view, as to the points  
22 made and the proofs of claim being inapposite or wide on the  
23 mark, I think the terms you used, but he did not do that.  
24 He did not reference them at all.

25 That being the case, the motion doesn't meet the

1 threshold of the Bankruptcy Rule 8013 of the cases that  
2 discuss what a motion needs.

3 THE COURT: Well, let me -- you know, I need to --  
4 we --

5 MR. SCAROLA: And I'm not in a position --

6 THE COURT: We need to -- really, I need to keep  
7 going back and forth with you a little because let's drill  
8 down on it. This is what you say. This claim is a secured  
9 claim to the extent of the value of such insurance policies  
10 if it is determined that claimant has an interest in such  
11 life insurance policies by reason of the ESOP and/or the  
12 custom and actual practice. That's what you said.

13 MR. SCAROLA: I actually am not the one who wrote  
14 that, it was predecessor counsel, but I understand you're  
15 quoting what's in the proof of claim.

16 THE COURT: Okay. But that's -- here's why I have  
17 a secured claim because there's an interest in the life  
18 insurance policy. On its face that doesn't describe a  
19 security interest in something that would give rise to a  
20 secured claim. Those words don't describe a secured claim.  
21 They don't --

22 MR. SCAROLA: I'm not going to agree or disagree  
23 with that. And frankly, it is because I would be doing my  
24 clients a disservice. The reason is that the trustee did  
25 not say that in its papers.

1 If the trustee --

2 THE COURT: Sure he did.

3 MR. SCAROLA: No, he did not, Your Honor, he did  
4 not anywhere make reference to, in any discussion, the three  
5 points made in the proofs of claim. They are simply not  
6 discussed. He discusses the Section 507 proposition about  
7 the last 180 days, but he does not discuss Section 541.

8 The Section 541 points which I think are the third  
9 of the three in the proof of claim and order, they are  
10 matters of law. They are --

11 THE COURT: I will be very --

12 MR. SCAROLA: -- issues with which you might  
13 disagree, or he might disagree meaning the trustee. But the  
14 trustee did not say I disagree. The trustee did not say  
15 they don't apply for some reason. And again, I cannot  
16 without doing my clients a grave disservice,  
17 extemporaneously brief what the trustee didn't brief.

18 The trustee didn't even say, gee, I can't get my  
19 head around that, or I don't understand it, or it's wide of  
20 the mark. It is simply not adverted to in the trustee's  
21 moving papers.

22 I can say no more than that, and that is an  
23 absolute truth. They quote it, they move on, they don't  
24 discuss it. All they say is we, the trustee, and our  
25 counsel have decided that this has no merit. In my

1 understanding of the law, that's not a proper motion. We've  
2 cited the cases and the rule that say so. And I will not  
3 without risk of committing malpractice extemporaneously  
4 brief these issues which the trustee hasn't briefed --

5 THE COURT: Well, you're --

6 MR. SCAROLA: -- standing here before Your Honor.  
7 I cannot do that, because the trustee has not done it.

8 THE COURT: Why don't you take the opportunity to  
9 explain to me what you mean by the 541 issue. Because it's  
10 far from clear what the theory is that you are asserting  
11 under 541(b)(7) or (8).

12 MR. SCAROLA: It may be far from clear, Your  
13 Honor, but again, I mean, on the face of the statute, it is  
14 outside -- it is an amount -- sorry. I am now addressing  
15 something the trustee has not said. I need to make that  
16 clear once again, and I think that this is not something  
17 that is a proper way for me to be proceeding on this motion.

18 THE COURT: Well, what are you --

19 MR. SCAROLA: I'm making an argument against  
20 something the trustee has not argued.

21 THE COURT: But --

22 MR. SCAROLA: But to the extent in general, I can  
23 state it. It is a statute, and the Court is much more  
24 familiar with the statute than I am, I expect. And the  
25 statute says, certain amounts received by an employer,



1 certain amounts received -- I'm sorry, it's either withheld  
2 or received I think is the terminology, or outside the  
3 estate. And --

4 THE COURT: Okay. So --

5 MR. SCAROLA: -- it is there in black and white on  
6 the face of the statue.

7 THE COURT: So in order to --

8 MR. SCAROLA: So if that is applicable, then the  
9 amounts that we are quote/unquote fighting over, are at a  
10 minimum entitled to secured status. In fact, I think some  
11 cases would say --

12 THE COURT: Here's the thing --

13 MR. SCAROLA: -- more than secured status.

14 THE COURT: -- what you just said I am having a  
15 hard time following. Just as point B that claimant -- that  
16 such life insurance policies are determined to be ESOP plan  
17 assets, and are not property of the debtor's estate.

18 In order to have a secured claim, you have to have  
19 a security interest on property of the debtor's estate. B  
20 and C of your recitation of why these are secured rests on  
21 the proposition that the insurance policies are not property  
22 of the estate.

23 It therefore follows that it is impossible for the  
24 claims to be secured by having an interest in something that  
25 is not property of the estate. So I'm not quite sure, I've

1 really not come across this kind of wrangling if you will  
2 over what the trustee said or didn't say, and I'm trying to  
3 be as measured about this as possible, but I think the  
4 difficulty that the trustee has had is that it's not a close  
5 question.

6 These -- as a matter of a prima facie claim, you  
7 have not asserted anything that comes close to establishing  
8 a prima facie case for these being secured claims.

9 MR. SCAROLA: Your Honor, I have not heard that  
10 from the trustee's counsel and the dialogue before this  
11 motion, and I have not heard that even in their motion as  
12 its written. That being the case, I understand Your Honor  
13 saying it is hard to understand some portion of this, I  
14 think you were referring to the Section 541 proposition. It  
15 is a legal issue, it is one that has not been briefed by the  
16 trustee in making the motion addressed to it.

17 THE COURT: Let me ask --

18 MR. SCAROLA: And if --

19 THE COURT: -- let me give you a hypothetical,  
20 okay.

21 If you cited to -- I'm going to pick a totally  
22 inapposite section, okay. You have a secured claim pursuant  
23 to the provisions of, and I literally just opened the book,  
24 okay, pursuant to the provisions of 11 U.S.C. 1106, which is  
25 the provision of the Code that has to do with the duties of

1 the trustee, as an example. It's completely got nothing to  
2 do with a secured claim.

3 Why would there have to be briefing over the  
4 inapplicability of that when from the get go, the trustee is  
5 simply saying prima facie -- he says it right here.  
6 "Claimants have failed to satisfy the basic rules of  
7 asserting a proof of claim, and therefore, do not establish  
8 any prima facie case." There's only --

9 MR. SCAROLA: Your Honor --

10 THE COURT: -- so many ways of saying that.

11 MR. SCAROLA: I don't know what paragraph you  
12 quoted, but from recollection, I think that's the paragraph  
13 in which they say, well, where's the mortgage document that  
14 should be attached. Well, we're not talking about that kind  
15 of claim.

16 To answer your hypothetical and I understand your  
17 hypothetical, the trustee could say, this is nonsense,  
18 because it doesn't apply for the following reasons. But  
19 this trustee --

20 THE COURT: But you can't put -- you can't say --

21 MR. SCAROLA: -- on this motion does not say --

22 THE COURT: -- or to take my hypothetical, right,  
23 you can't -- it doesn't apply for the following reasons. It  
24 doesn't apply because it doesn't apply. I mean, it's hard  
25 to explain the inapplicability of something that wholly

1 doesn't apply. How can you --

2 MR. SCAROLA: Your Honor --

3 THE COURT: -- explain that --

4 MR. SCAROLA: -- first of all I don't think --  
5 sorry.

6 THE COURT: -- you know, if you say, you know, the  
7 sun rises in the west. The answer is, no, it doesn't.  
8 Right? There's not much, the sun -- you say no, it doesn't,  
9 the sun rises in the east. So here the trustee is  
10 attempting to say, this is what you have to do to satisfy  
11 the rules in asserting a prima facie claim. I'm looking at  
12 what was done, none of what is here satisfies that.

13 MR. SCAROLA: Respectfully, Judge, I disagree. I  
14 think in my first appearance before you, you said don't say  
15 respectfully, but I don't know how else to put it.

16 THE COURT: Okay.

17 MR. SCAROLA: I don't want to go in circles with  
18 you. I can only say that it is so fundamental that, yes,  
19 had I cited a proposition that the sun sets in the east and  
20 rises in the west, I do believe if you want to take that  
21 extreme hypothetical, that a proper motion would have at  
22 least had a paragraph explaining based on --

23 THE COURT: Well, what about --

24 MR. SCAROLA: -- for reference to nothing other  
25 than a Wikipedia page --

1 THE COURT: But what about --

2 MR. SCAROLA: -- with why that silliness might not  
3 be true. But we're not dealing with --

4 THE COURT: -- the bankruptcy -- wait. But wait.

5 MR. SCAROLA: -- something silly.

6 THE COURT: But wait. What about in the reply,  
7 paragraph 5, page 2, there's a repeated recitation of  
8 paragraph 4 as this Court and others in the Second Circuit  
9 have held, claims are disallowed or reclassified for failure  
10 to support the claim with sufficient evidence, because  
11 absent documentation it's not sufficient for the objector to  
12 concede the validity of a claim where --

13 MR. SCAROLA: Well, again, I don't want to go in  
14 circles, Your Honor. There is no documentation as to  
15 Section 541. It's not that kind of an issue.

16 THE COURT: Well then you say --

17 MR. SCAROLA: It's not referring --

18 THE COURT: -- that under --

19 MR. SCAROLA: May I at least give the answer?

20 THE COURT: Yeah, go ahead.

21 MR. SCAROLA: I mean, if isn't (indiscernible) you  
22 accept, I'll understand that. But that paragraph fairly  
23 read is addressed to the plain vanilla scenario of okay  
24 you're claiming you have a mortgage or a UCC security  
25 interest, you've got to attach it. And it's self-evident

1 that that's not what's identified in the proof of claim.

2 There is no document.

3 One could disagree with the applicability of  
4 Section 541 or not. But it is incumbent on the trustee to  
5 brief it, who has not, and if --

6 THE COURT: But what do I about -- no, what about  
7 --

8 MR. SCAROLA: -- he does not, I believe the motion  
9 has to be denied.

10 THE COURT: But he has --

11 MR. SCAROLA: If you think that burden shifted to  
12 us --

13 THE COURT: Mr. Scarola, he has --

14 MR. SCAROLA: -- you're going to rule against us.

15 THE COURT: -- briefed it. Paragraph 5,  
16 "Bankruptcy Rule 3001(c) requires that when a claim or  
17 interest in property of the debtor securing the claim is  
18 based on a writing, the original or duplicate shall be filed  
19 with the proof of claim."

20 So I think your point is that there is no writing.  
21 Although you --

22 MR. SCAROLA: It is on that claim something in the  
23 nature of writing, correct.

24 THE COURT: So how you could have a security  
25 interest --

1 MR. SCAROLA: It's a statutory proposition.

2 THE COURT: -- that arises without a writing is an  
3 interesting question.

4 MR. SCAROLA: It's a statutory proposition.

5 THE COURT: Okay. And the statute is 541 you say?

6 MR. SCAROLA: Correct.

7 THE COURT: Right. And footnote 4 in the  
8 trustee's reply says, "It is true that the trustee did not  
9 directly address in the motion the assertions in the proof  
10 of claim that the claims were secured to the extent of the  
11 value of the COLI policies if it is determined that wages  
12 withheld by LBI are contributed to LBI," et cetera, "or  
13 Sections 541(b)(7) and/or (8) of the Bankruptcy Code. These  
14 provisions do not give rise to security interests in the  
15 debtors and are irrelevant to the classification of the  
16 claims.

17 "Moreover, Bankruptcy Rule 3001(d) provides that  
18 if a security interest in property of the debtor is claimed,  
19 the proof of claim shall be accompanied by evidence that the  
20 security interest has been perfected."

21 On no level has the proof of claim met the  
22 requirements of 3001(c) or (d). The citations to 541 as the  
23 trustee says, are irrelevant. So I concur with the  
24 trustee's view that they're irrelevant. So I'm at a loss to  
25 know how much more -- you know, how many more rounds we can

1 go. I find it difficult to give a fuller explanation of why  
2 it's irrelevant, and I would ask you what your evidence is  
3 as required by Rule 3001(d) that the security interest has  
4 been perfected.

5 MR. SCAROLA: A number of ones. First of all,  
6 you're telling me that their brief is in a footnote in their  
7 reply brief. Our footnote 8 of our brief discusses the law  
8 as to why you can't do that, and it's an age old proposition  
9 that you can't make your argument in your reply brief, if  
10 that's even an argument and I'm not sure that it is.

11 Again, with regard to the question of what is the  
12 evidence, I believe it is a legal argument with respect to  
13 Section 541, not addressed. And again, I asked Mr.  
14 Fitzgerald what is your proposition on this, he did not  
15 address it at all with me. He didn't address it in these  
16 papers, except in what I think are statements generally  
17 asked a position that the proof of claim is inadequate  
18 because of the lack of something, whether it's the  
19 attachment of something or something else. He did not  
20 address the applicability or not of the statute.

21 In other respects, in the dialogue that he and I  
22 had, I asked --

23 THE COURT: Because you haven't asserted a prima  
24 facie claim. I keep going --

25 MR. SCAROLA: We are also -- you know, I keep



1 trying to get the answer out --

2 THE COURT: Go ahead.

3 MR. SCAROLA: -- and I don't seem to.

4 THE COURT: Go ahead.

5 MR. SCAROLA: But I'm arguing against a motion  
6 that hasn't been made, which is the basic problem I have  
7 here, and the basic -- and the principal opposition in our  
8 brief. I'm arguing against something that hasn't been  
9 stated by the trustee. And I don't feel comfortable doing  
10 that because that's not a way to serve my clients. I don't  
11 believe that's what the law provides or requires, but what  
12 is your evidence.

13 I mean, one aspect of the dialogue with the  
14 trustee was where is the discovery. There were changes to  
15 the insurance policies. Candidly I'm somewhat handicapped  
16 in addressing a long dialogue that took place about the  
17 insurance policies after the bankruptcy, because on the part  
18 of the group with which I work most closely, the person  
19 spearheading that was killed in an accident in December of  
20 2014. I've lost the benefit of what learning that person  
21 has.

22 We asked for discovery, we would've asked for more  
23 pointed discovery, but the trustee's answer was initially  
24 through Mr. Fitzpatrick, I'm going to look into giving you,  
25 I'm not quite sure what, and then later, we're not going to

1 give you anything.

2 Now the rules about hearings, which -- and we  
3 discuss this in our brief talk about an evidentiary hearing  
4 after discovery. There are many changes involving these  
5 insurance policies. I think there were initially three sets  
6 of policies with three different companies. There was  
7 review by the IRS. We didn't even get --

8 THE COURT: But you say that they belong to -- you  
9 say --

10 MR. SCAROLA: -- to that.

11 THE COURT: You say that -- you, in your proof of  
12 claim, you say that they're property of the ESOP, not  
13 property of the debtor. As a matter of law, you cannot have  
14 a secured claim without an interest in property of the  
15 debtor.

16 So you, yourself, are articulating a basis for a  
17 secured claim that is unsustainable. It is incorrect. You  
18 cannot have a secured claim against property that's not  
19 property of the debtor.

20 So within the four corners of your argument --

21 MR. SCAROLA: I'm sorry.

22 THE COURT: Have you --

23 MR. SCAROLA: The insurance policies were property  
24 of the debtor, I'm not sure I understand.

25 THE COURT: You say in your proof of claim, that

1 they belong to the ESOP, that they're not property of the  
2 debtor. That's what you say.

3 MR. SCAROLA: I think I misheard the last sentence  
4 that Your Honor spoke or --

5 THE COURT: Okay. "Such life insurance policies  
6 are determined to be ESOP plan assets in accordance with the  
7 provisions of ERISA, and that in accordance with applicable  
8 law, such life insurance policies may be used only for the  
9 exclusive benefit of the ESOP claimants, and are not  
10 property of the debtor's estate." Your words --

11 MR. SCAROLA: And if that doesn't give rise to a  
12 security --

13 THE COURT: -- in the proof of claim.

14 MR. SCAROLA: -- a security interest, and I  
15 believe there are cases if we would've had proper briefing  
16 which -- property that the trustee or the debtor has custody  
17 of, which are not property of the debtor, then they either  
18 equated to the status of a security interest or they're  
19 treated more than a mere security interest. The stay should  
20 be lifted, and there should be an opportunity to seek back  
21 the property that belongs to the debtor.

22 I mean that's -- we're opening a set of issues  
23 that the trustee did not brief. And again, you're putting  
24 me in the position of articulating a brief on something as  
25 an opponent to a motion that my adversary has not put out --

1 THE COURT: Well, I'm not --

2 MR. SCAROLA: -- in front of us. And that is  
3 fundamentally what the opposition is.

4 I asked Mr. Fitzpatrick in July, tell us, and he  
5 cited the Danberry (ph) case which deals solely with the  
6 question of unfunded plans, which is not even an issue. I  
7 said that's not the point, what about what's in the proof of  
8 claim. He said, we disagree with you. He might have even  
9 used the word I fundamentally disagree with you, but I think  
10 I quoted it. And that's it. And there's no more than that  
11 in his papers.

12 And I cannot, because as I said enumerable times  
13 now, I cannot do my clients a service by acting as if --

14 THE COURT: Well, you --

15 MR. SCAROLA: -- I have just litigated and briefed  
16 the issue that was not briefed --

17 THE COURT: Well, here's the thing.

18 MR. SCAROLA: -- as we believe needed to be done  
19 by the trustee. And if Your Honor is going to disagree with  
20 --

21 THE COURT: Paragraph 21 --

22 MR. SCAROLA: -- that, I'm going to lose this  
23 motion.

24 THE COURT: Paragraph 21 --

25 MR. SCAROLA: I understand.

1 THE COURT: Paragraph 21 of the initial objection  
2 says, "The claims do not provide any evidence that they have  
3 any security interest, or that any security interest has  
4 been perfected as is required by Rule 2001(d). None of the  
5 claimants have submitted any document evidencing the  
6 perfection of a security interest or lien in the assets of  
7 LBI. The only property in which some of the claimants  
8 purport to assert a lien are corporate owned life insurance  
9 policies, which they assert were purchased by LBI in order  
10 to recoup the costs of operating the deferred comp claims.

11 "Even assuming that LBI did purchase COLIs for  
12 that purpose, the claimants have not provided, and the  
13 trustee is not aware of any support for the theory that they  
14 have a security interest in such COLI policies.

15 "Footnote. In fact, the ESOP agreements state  
16 that the payments made under the agreements are unsecured."

17 So --

18 MR. SCAROLA: Two things. Your Honor, that  
19 doesn't address the 541 issue, number one. Number two, the  
20 footnote relies on exactly what Mr. Fitzpatrick told the  
21 district court, they will not rely on, which is a  
22 proposition in the ESOP agreement, which is subject to the  
23 litigation on the subordination issue, the one to which Your  
24 Honor eluded to earlier, that you thought might have been  
25 already subject to a trial but it hasn't been reached.

1           There are reasons, and now we're getting way far  
2       afield from what's been briefed here, but --

3           THE COURT:   Secured versus unsecured is different  
4       than subordinated.   So this is cited --

5           MR. SCAROLA:   Yes, it is.   It is different from  
6       subordinated, but the point I'm making is that you quoted a  
7       passage of the trustee's brief in which he's referring to a  
8       sentence or a clause in the ESOP agreement, and there are  
9       various reasons why the adversary proceeding on  
10      subordination is asserting essentially as its defenses,  
11      because they're a defendant in an adversary proceeding to  
12      subordinate, our clients are, that that language is invalid  
13      for a number of reasons.

14           I -- all I'm saying is that by opening that door,  
15      he's just sucked back in the issues that are, in fact, on  
16      appeal with regard to the question of, is this case  
17      arbitral.   And that is something that when we saw Judge  
18      Ramos on July 29th he said he's not going to do, yet he did  
19      it, and now I'm being asked to address it.

20           THE COURT:   Well, I feel like --

21           MR. SCAROLA:   And I feel like I'm again --

22           THE COURT:   -- you know, I feel like you're -- and  
23      I feel like you're setting me up for some sort of a  
24      procedural error that you're then going to try to make  
25      something out of it.   You don't even --

1 MR. SCAROLA: If I were only so (indiscernible) I  
2 would be quite the better lawyer than I am, but.

3 THE COURT: Well, I think -- my point -- the point  
4 that the trustee makes by dropping that into a footnote is  
5 that the only documents that you allude to have an  
6 indication in them that's directly contrary to what you're  
7 saying. I don't need to, just to be clear, I don't need to  
8 reach that point at all because my view is that the trustee  
9 is correct, that there has not been compliance with  
10 Bankruptcy Rule 3001, and that there has not been the  
11 assertion of a prima facie claim on -- there has not been a  
12 prima facie assertion of a secured claim for the reasons  
13 that I think I've now tried to explain a couple of times.

14 What I'd like to do is to allow Mr. Fitzpatrick an  
15 opportunity to respond to some of the things that you said,  
16 because they were rather pointed in his direction, in both  
17 senses of the word, and then I'll be happy to give you a  
18 chance to wrap up.

19 MR. SCAROLA: Your Honor, at the end of this  
20 passage, I just need to again stress that in answering the  
21 Court's question, in no respect do I want to be deemed to  
22 have stepped back from the position in my brief, which is  
23 what was submitted by the trustee as a motion does not  
24 constitute a sufficient motion for purposes of --

25 THE COURT: Okay. I can't --

1 MR. SCAROLA: -- what they are trying to achieve.  
2 I have tried to address the questions as best I could  
3 extemporaneously. It is not hopefully to be quoted back to  
4 me as see Scarola gave the answer, or the best answer they  
5 had because that will only happen in the face of what we  
6 would've thought would've been a proper motion.

7 I understand Your Honor's indication of how you  
8 might rule, and nothing about this is an effort by us to  
9 either set up some procedural defect because frankly in July  
10 and in August when we corresponded with Mr. Fitzpatrick, I  
11 say, lay your cards on the table, and he didn't.

12 So while I understand the Court's concern about  
13 procedural errors, we're certainly not setting anything up.  
14 We made every effort to have Mr. Fitzpatrick even before a  
15 motion was made, lay out considerations, some of which may  
16 be along lines that you discussed on one issue or another,  
17 but they weren't. They weren't discussed with us. When I  
18 said, let's do this in an orderly way, and they weren't put  
19 in his papers.

20 So with respect to, you know, the question that we  
21 have in some way been -- I'm going to use the word  
22 disingenuous, although I know it hasn't come up, I really  
23 don't think that that's the case, and I think we've been --

24 THE COURT: I don't think anyone's suggesting that  
25 you've been disingenuous.



1 MR. SCAROLA: It's a reference back to the concept  
2 of my discussions somehow setting up a procedural failure.  
3 I believe the procedural failing is set up in the manner in  
4 which the trustee proceeded.

5 Your Honor's indications --

6 THE COURT: Well, that's going to --

7 MR. SCAROLA: -- you'll disagree with that, but  
8 that is --

9 THE COURT: Okay.

10 MR. SCAROLA: -- where we are.

11 THE COURT: No, I was referring to your reference  
12 to the trustee reneging, if you will, on a representation  
13 that had been made to Judge Ramos, and I, of course, have no  
14 knowledge of --

15 MR. SCAROLA: It's in our papers.

16 THE COURT: -- anything.

17 MR. SCAROLA: It's in our papers, it's in the  
18 declaration that's --

19 THE COURT: Well, I --

20 MR. SCAROLA: -- been submitted and it's in our  
21 brief. I mean, I'm just saying it's not something I'm  
22 springing, that was discussed in our papers.

23 THE COURT: Well, I would -- I won't say anymore  
24 about that.

25 Mr. Fitzpatrick.

1 MR. FITZPATRICK: Yes, Your Honor. Just on the  
2 procedural point, the -- it is correct that because the  
3 motion to withdraw the reference and the arbitration appeal  
4 were currently pending before Judge Ramos, I did request a  
5 conference, and we had a conference before Judge Ramos  
6 before I made this motion in front of Your Honor.

7 We believed frankly that we could have made this  
8 motion even without that conference because the matters were  
9 separate. But I just thought it was a common sense thing to  
10 do.

11 THE COURT: Sure. I would have -- you know, with  
12 respect to the motion to withdraw the reference, I proceed  
13 under the rubric of until the district court tells me to  
14 stop I keep going. And I think the district understands  
15 that and I have had no communication with Judge Ramos.

16 With respect to the appeal, it's a fair question.  
17 I probably would have asked the question of you, as to  
18 whether or not I ought to proceed given the pendency of the  
19 appeal on the arbitration.

20 MR. FITZPATRICK: Yes. And our position on that  
21 is that you can because the only issue that is being argued,  
22 that is subject to arbitration is the subordination issue.  
23 And the arbitration clause itself says that the things that  
24 -- refers to the subordination issue and not the secured  
25 issue. And so that would've been our answer had Your Honor

1 asked.

2 We also just candidly felt that because the  
3 motions were pending before Judge Ramos that a conference  
4 was appropriate, and we have attached the transcript of that  
5 conference to our papers.

6 THE COURT: Yes, okay.

7 MR. FITZPATRICK: I -- the only representation I  
8 believe I made was that the issues of subordination and  
9 secured versus unsecured are different, which I stand by.

10 In terms of the merits, candidly I think Your  
11 Honor and Mr. Scarola discussed anything -- any points I  
12 would have made on reply. If Your Honor has questions, I'm  
13 happy to address them, but that is our position, that  
14 Bankruptcy Rules 3001(c) and (d) haven't been complied with  
15 by the proof of claim. And so there is no security interest  
16 here.

17 The issues with respect to 541, as Your Honor  
18 said, don't have anything to do with security interests, and  
19 that's our position. Thank you, Your Honor.

20 THE COURT: Okay. All right. Mr. Scarola, any  
21 further comments?

22 MR. SCAROLA: No, Your Honor.

23 THE COURT: All right. Well, I'm going to grant  
24 the trustee's motion to reclassify for the reasons I think  
25 that I have extensively explained here today on the hearing.

1 So I will ask the trustee to prepare an order and to share  
2 it with Mr. Scarola and the transcript will stand as the  
3 reasons for the Court's ruling.

4 All right? Thank you all very much.

5 All right. I think we now move into some of the  
6 adversary proceeding pre-trial conferences.

7 I have LBSF versus Longwood.

8 Good morning.

9 MR. BENNETT: Good morning, Your Honor, Joshua  
10 Bennett from Paul Hastings on behalf Lehman Brothers  
11 Holdings, Inc. as the plan administrator for Lehman Brothers  
12 Special Financing, Inc.

13 There are two adversary proceedings for which  
14 we're counsel that are on the record today. They're both  
15 substantially similar matters. Counsel is the same in both  
16 parties, the transactions at issue are virtually identical.

17 Just very briefly, both of them relate to interest  
18 rate swaps that were terminated by Lehman's counterparty  
19 upon the bankruptcy, and the dispute is about the  
20 termination payment.

21 I believe Your Honor has familiarity with these,  
22 because there are several other --

23 THE COURT: Yes.

24 MR. BENNETT: -- termination interest rate --

25 THE COURT: Quite a few.

1 MR. BENNETT: Okay. The issues in both of these  
2 matters are that upon the termination, the counterparties  
3 did the market quotation process as is required by the four  
4 corners of the interest rate swap and the market quotation  
5 failed. And based on that failure, the counterparty  
6 determined that its loss payment was equal to zero. We  
7 believe that's contrary to law, we believe it's contrary to  
8 the contract, and we believe that the loss payments should  
9 have been in the range of \$2 million in one of the matters  
10 and roughly \$6 million in the other.

11 THE COURT: Is Longwood at Oakmont a non-profit, a  
12 hospital, a governmental entity?

13 MR. BENNETT: Yes. I'm sure they can answer that  
14 question better than I can.

15 THE COURT: Okay.

16 MR. BENNETT: But both the defendants in the two  
17 cases are non-profit charitable organizations. Both are  
18 involved in old age homes and old age facilities, senior  
19 care in the Pennsylvania area. I believe they're both  
20 affiliate -- not necessarily corporate relatives, but  
21 affiliated through an old age care network in the  
22 Pennsylvania area. And the --

23 THE COURT: All right. And have there been -- has  
24 there been any ADR or any settlement discussions?

25 MR. BENNETT: There was ADR certainly years ago,

1 obviously it did not result in a resolution of the matter.  
2 Both actions were effectively stayed pursuant to agreements.

3 THE COURT: Right.

4 MR. BENNETT: That was lifted when we -- when  
5 Lehman terminated the stipulation, shortly after file these  
6 proceedings, they were filed -- both complaints were filed  
7 on September 15th. Both answers were filed on Friday,  
8 October 30th. We've had several discussions, several  
9 successful good effective efficient discussions with defense  
10 counsel in good faith. For the last couple of days, we've  
11 been trying to work out a scheduling order. We know Your  
12 Honor's position based on some of the other matters that you  
13 want to move these along as quickly as possible.

14 THE COURT: Right.

15 MR. BENNETT: As plaintiffs will be happy to do  
16 so. What we proposed recently to defense counsel was a  
17 scheduling order based on the model in the Lehman versus  
18 Commonwealth of Massachusetts matter. It's a scheduling  
19 order that you so ordered about six weeks ago.

20 THE COURT: Okay.

21 MR. BENNETT: Essentially the same items and the  
22 same time period. We added a little more time in light of  
23 some holidays that are coming up. We are very close. I  
24 think there's roughly two or three items depending on how  
25 you shake it out that we're still in some discussions with.

1 I discussed it with defense counsel this morning  
2 before coming into this courtroom, so we're very close. I  
3 believe both sides --

4 THE COURT: Is it your concept that the -- that  
5 these two matters are going to proceed in tandem because of  
6 the common element of the advisor or are they just going to  
7 -- that's neither here nor there?

8 MR. BENNETT: We would like them to proceed in  
9 tandem. We believe the scheduling items should be the same  
10 dates. One of issues that may or may not be outstanding is  
11 precisely that, and I'll leave it to my counterparty to  
12 respond to.

13 THE COURT: Okay.

14 MR. BENNETT: There are similarities. I believe  
15 the same documents, you know, can be produced in one, and  
16 can be marked for -- you know, as if production in the  
17 other, and many of the witnesses, if not most of the  
18 witnesses, will be --

19 THE COURT: Okay. All right.

20 MR. BENNETT: -- identical in both matters.

21 THE COURT: Thank you. All right.

22 MR. LAMPL: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. LAMPL: David Lampl, Leech Tishman Fuscaldot  
25 and Lampl, Pittsburgh, Pennsylvania, and my partner, David

1 Weist (ph) is here with me today.

2 THE COURT: And you're here for both matters?

3 MR. LAMPL: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. LAMPL: Both Presbyterian SeniorCare and  
6 Longwood are -- Presbyterian SeniorCare is a faith based  
7 charitable organization providing senior care assisted  
8 living facilities in western Pennsylvania.

9 THE COURT: Okay.

10 MR. LAMPL: Longwood is a separate entity, but  
11 they are affiliated in the sense that they are both again  
12 not for profit charitable organizations --

13 THE COURT: Okay.

14 MR. LAMPL: -- providing senior care services to  
15 the elderly.

16 We represent both defendants. We have been served  
17 with the complaints. We asked for an extension of time to  
18 file those answers, and we were granted a two week extension  
19 of time. We did work diligently to file the answers in  
20 these matters. Those were filed on Friday. On Friday  
21 afternoon, Mr. Bennett circulated a proposed scheduling  
22 order. We circulated on Monday an order which we modeled  
23 after a very similar case which is pending before Your Honor  
24 in the Mirabella matter, which is also a senior care  
25 facility on the west coast.



1           There are some interesting overlaps between these  
2 matters we believe. But as Mr. Bennett represented, we are  
3 very close to working out a scheduling order. We do need to  
4 have some input from our clients, given the timing of the  
5 answer, and our travel schedules in getting here today.

6           We have some --

7           THE COURT: It's a nice day to be in New York,  
8 though.

9           MR. LAMPL: A nice day to be in New York, yes,  
10 Your Honor.

11           THE COURT: It would've been nicer if we were  
12 having a ticker tape parade for the Mets, but that's a  
13 different story.

14           MR. LAMPL: Right. As a side note, last year I  
15 was in San Francisco at this time when the Giants had their  
16 ticker tape parade, so I thought maybe the same would happen  
17 in New York, but not to be.

18           And we're, of course, disappointed that the  
19 Pirates only made it to the wild card game and did not  
20 proceed beyond that.

21           THE COURT: There's always next year, right?

22           MR. LAMPL: Always next year. Always next year.

23           So, Your Honor, again, we're close. One of the  
24 fundamental allegations of the complaint is that somehow  
25 these two charitable entities by following the advice of

1 their professional advisors somehow corrupted the  
2 marketplace, and therefore, we think it may be imperative  
3 for us to depose the 11 or 12 referenced market makers that  
4 were solicited to make a market quotation for or given an  
5 offer to assume the position that Lehman Brothers Special  
6 Finance had in this interest rate swap agreement, so that we  
7 can refute this fundamental allegation that somehow this was  
8 the springboard or the cascade of bad faith allegations that  
9 have been made in the complaint.

10 So again, our defendants are not sophisticated  
11 corporate, you know, for profit entities, and they find  
12 themselves in this world of interest rate derivatives, as  
13 opposed to the protection that they thought they were buying  
14 by those agreements.

15 THE COURT: Right. I mean I think that, you know,  
16 it's no with great joy that these claims are pursued against  
17 non-profits and governmental entities. Unfortunately, there  
18 are a lot of them, and I think that it came probably as an  
19 unhappy surprise that what was viewed as financial  
20 protection, could possibly turn in this way. So I  
21 appreciate kind of the level of -- particular level of  
22 unhappiness with being faced with these claims.

23 Nonetheless, the trustee has a fiduciary duty and  
24 has to proceed, and this isn't the first time where there's  
25 been an allegation that the termination and the market

1 quotation process was not conducted in a manner that's  
2 consistent with what the ISDA requires. So we'll just have  
3 to get to the bottom of it.

4 MR. LAMPL: Right. And we'll have to deal -- and  
5 that is the allegation we obviously with our financial  
6 advisors believe differently and that's what will be before  
7 Your Honor to decide.

8 THE COURT: Do you think that there is any benefit  
9 before you embark on what's going to be expensive litigation  
10 for everybody, that you already mentioned, you know,  
11 deposing the referenced market makers, there will have to be  
12 experts. Is there any benefit to sitting down with a  
13 mediator?

14 MR. LAMPL: Your Honor, the clients, prior to our  
15 involvement, did participate in the mediation process that  
16 had been established.

17 THE COURT: Uh-huh.

18 MR. LAMPL: Whether there would be some benefit in  
19 perhaps with a newly or a different mediator, there may be.  
20 But I don't think we're at that point yet. And it's  
21 something --

22 THE COURT: Okay.

23 MR. LAMPL: -- that I think we can explore as we -  
24 -

25 THE COURT: Okay.

1 MR. LAMPL: -- delve into this.

2 THE COURT: All right. So are you contemplating a  
3 stipulation that culminates in a trial date?

4 MR. LAMPL: Your Honor, I think our contemplation  
5 is that we will submit an order which would then I think  
6 after all discovery is completed, report back to Your Honor.  
7 And I believe the proposal is for Your Honor at your  
8 discretion to schedule another pre-trial conference, then,  
9 of course, set a trial date at that point.

10 THE COURT: Give me a rough idea of the time  
11 period you're looking at because we're now in the world of -  
12 - we're booking, we're booking trials.

13 MR. LAMPL: Right. I think the proposed order,  
14 Your Honor, is for all discovery to be completed roughly by  
15 May of next year.

16 THE COURT: May of 2016.

17 MR. LAMPL: Of 2016. That was the proposal. We  
18 may tweak that within a few days, certainly not months, you  
19 know, maybe a month at most or two. So somewhere in that  
20 time frame, Your Honor. And then at the end of the -- that  
21 time frame and the exchange of expert reports, it is  
22 contemplated, at least under the proposal, that Your Honor  
23 would then set at your discretion a pretrial conference.

24 THE COURT: Okay. I mean, off the top of my head,  
25 I already know that I have two weeks at the end of September

1 booked for a trial. So the spaces are going like hot cakes.  
2 So, you know -- so October of next year is still a  
3 possibility, early December is still a possibility. Give  
4 some thought as you move toward that goal. We certainly  
5 don't have to give a view today of how much time you would  
6 need, bearing in the mind the maximum, that lawyers are  
7 always wrong when they estimate time. And whether or not,  
8 to that point, my custom and practice is to let the  
9 attorneys be the drivers of how much time they need. The  
10 alternative, of course, is to have a timed trial and have a  
11 set number of days, and have the parties divide up the trial  
12 time.

13 If that's preferable to you folks, I'm happy to do  
14 that as well. So -- but it's -- that's just kind of like  
15 far in the future.

16 MR. LAMPL: And quite candidly, I'm sure the  
17 determination of how much time we will need will be  
18 developed as we go through the discovery process so that  
19 while --

20 THE COURT: Right, right.

21 MR. LAMPL: -- whether we need to bring in as  
22 witnesses the reference market makers or one or two as a  
23 sampling or not.

24 THE COURT: Okay.

25 MR. LAMPL: You know, that may streamline the

1 process, but I don't think we'll know that --

2 THE COURT: Right.

3 MR. LAMPL: -- until we get further along.

4 THE COURT: All right. So I'll wait to hear from  
5 you with -- once you've agreed on an order and we'll get  
6 that on the docket, and you'll let me know if at any point  
7 you need our help or you decide that you want to have a  
8 session with a mediator, I'd be happy to make some  
9 suggestions on --

10 MR. LAMPL: We appreciate that --

11 THE COURT: -- someone who might be able to help.

12 MR. LAMPL: -- Your Honor, and we will take you up  
13 on that.

14 THE COURT: All right. Thank you very much.

15 Okay. I think that leaves us with -- is that it?  
16 Is there another one?

17 MR. BENNETT: Thank you, Your Honor.

18 THE COURT: Thank you. I think that's it. Yeah,  
19 is anyone here on Allied World Assurance versus LB Rose  
20 Ranch?

21 (No response)

22 THE COURT: Okay. That's it.

23 (Proceedings concluded at 11:12 AM)

24 \* \* \* \* \*

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I N D E X

R U L I N G S

IDENTIFICATION	PAGE
Adversary proceeding: 08-01420-scc Lehman	43
Brothers, Inc., Doc #12656 Trustee's Motion to	
Reclassify Certain Substantively identical	
Deferred Compensation Claims as Unsecured General	
Creditor Claims	

**CERTIFICATE**

I, Sheila G. Orms, certify that the foregoing is a true and accurate transcript from the official electronic sound recording.

**Sheila G. Orms**

Digitally signed by Sheila G. Orms  
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**SHEILA ORMS, APPROVED TRANSCRIBER**

**DATED: November 5, 2015**

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